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No. (1)

In The

Supreme Court of the United States

JACK LINDSEY,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Petition For A Writ Of Certiorari To The Appeals Court Of Massachusetts

PETITION FOR WRIT OF CERTIORARI

MARK L. STEVENS, ESQUIRE
Counsel of Record
5 Manor Parkway
Salem, NH 03079
Tel. (603) 893-0074

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. WHETHER THE COMMUNITY CARETAKING EXCEPTION TO THE FOURTH AMENDMENT'S WARRANT REQUIREMENT ENCOMPASSES THE FORCED, WARRANTLESS ENTRY INTO A HOME DURING THE NIGHTTIME TO CONDUCT A "WELL-BEING CHECK?"

2. WHETHER THE CONTINUED SEARCH FOR WEAPONS, AFTER THE INITIAL FORCED ENTRY INTO THE PETITIONER'S HOME FOR A "WELL-BEING CHECK" REVEALED THAT THERE WAS NO ONE HOME BUT A GUN WAS IN PLAIN VIEW, VIOLATED THE FOURTH AMENDMENT?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

Jack Lindsey is an individual who was the defendant in the proceedings in the state court in the Commonwealth of Massachusetts and the appellant in proceedings below in the Massachusetts Appeals Court and the Massachusetts Supreme Judicial Court.

As this was a criminal proceeding, the Commonwealth of Massachusetts was the prosecuting party.

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The Massachusetts Appeals Court issued a published opinion reported as *Commonwealth v. Lindsey*, 893 N.E. 2d 52 (Mass. App. Ct. 2008). The Massachusetts Appeals Court opinion is reproduced in the appendix to this petition (App. 1-17). On November 25, 2008, the Massachusetts Supreme Judicial Court denied further appellate review without a published opinion (App. 30).

STATEMENT OF JURISDICTION

The Massachusetts Supreme Judicial Court denied review on November 25, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). The petitioner has notified the Attorney General of the Commonwealth of Massachusetts of this petition by serving it upon the Attorney General's Office, One Ashburton Place, Boston, MA 02108.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved include the Fourth and Fourteenth Amendments to the United States Constitution, which provide as follows:

The Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall

> not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

STATEMENT OF THE CASE

On November 28, 2001, the petitioner was arrested and charged by the Chelsea, Massachusetts Police with a number of firearm charges following a warrantless forced entry into his home for a "well-being check on an elderly female" (Tr. M. 7; Tr. M. 29)[1]. The petitioner was subsequently indicted by a

[1] References to the transcript of the hearing on the motion to suppress held in the Suffolk Superior Court are made herein as "(Tr. M.)" followed by the page number. The transcripts of the jury trial are cited by volume and page as "(Tr. ___)".

Suffolk County grand jury for several weapons charges. The petitioner filed a motion to suppress all evidence on December 16, 2002, and the Superior Court scheduled a hearing on the motion.

Immediately prior to the hearing, the Commonwealth revealed that the arresting officer had written a report that had not been disclosed to the petitioner (Tr. M. 4-5). The officer's report identified a civilian witness, Jose Cuadrado, who had become unavailable. The police made their decision to break into the petitioner's house in large part based upon what Cuadrado told the police (Tr. M. 10-13). Neither party could locate Cuadrado (Tr. M. 5) and the petitioner moved to dismiss the case.

On February 19, 2004, the Trial Court held a hearing on the petitioner's motion to dismiss and motion to suppress evidence. After an evidentiary hearing, the Trial Court denied both motions (Tr. M 152; 158). On August 22 & 23, 2005, a jury trial was held in the Trial Court. The petitioner was convicted on fourteen of sixteen indictments (Tr. 2-94-104). On September 13, 2005, the petitioner was sentenced to a term of two and a half years to two and a half years and one day of incarceration in the state prison and three years probation following release from incarceration.

The petitioner appealed to the Massachusetts Appeals Court, which issued a full opinion on August 29, 2008, affirming his convictions. *Commonwealth v. Lindsey*, 893 N.E. 2d 52 (Mass. App. Ct. 2008). The

Massachusetts Supreme Judicial Court denied review on November 25, 2008. This petition follows.

STATEMENT OF FACTS

At approximately 8:00 p.m. on November 27, 2001, Chelsea Officer Edwin Nelson received a radio call to go to 36 Cary Avenue in Chelsea for a "well-being check on an elderly female" (Tr. M. 7; 29). Officer Nelson arrived at the address a few minutes after the call (Tr. M. 8). Upon arrival, Officer Nelson spoke with Ms. Minerva Cruz, who had called in the well-being check to the police (Tr. M. 10).

Officer Nelson also spoke to another neighbor, Jose Cuadrado, while he was speaking with Ms. Cruz (Tr. M. 10). Cuadrado had been the only person who had talked to the elderly woman (Tr. M. 10). Cuadrado did not speak English, so he had gone to enlist the assistance of Ms. Cruz to determine what the elderly woman was saying (Tr. M. 12).

When Cruz and Cuadrado returned to the location where Cuadrado saw the woman she was not there. Ms. Cruz never spoke to the elderly woman that night (Tr. M. 12; 27). Ms. Cruz guessed that the woman "might be in the house and maybe something happened to her" (Tr. M. 12-13). Mr. Cuadrado did not know where the elderly woman went after speaking with her (Tr. M. 28).

Officer Nelson relayed Ms. Cruz' conjecture about the possibility that the elderly woman may have entered her home, and that maybe something happened to her, to Chelsea Sergeant Fern (Tr. M. 13). Based on Cruz' hypothesis, Sergeant Fern called the Chelsea Fire Department to the scene to break the door to the petitioner's home down (Tr. M. 13).

Fire Captain Quartieri arrived at the scene with two fire department personnel and equipment (Tr. M. 14-15). Under Sergeant Fern's direction, Captain Quartieri's men used a "hydraulic forcible tool" to break the front door of the petitioner's house open (Tr. M. 15; 105). After the police and fire personnel broke the front door in, Officer Nelson saw two doors (Tr. M. 16). The door on the right led up a flight of stairs. Officer Nelson and the other officers elected to ascend the flight of stairs though the door on the right in the search for the elderly woman (Tr. M. 16). In response to the police calling out that they were Chelsea Police, no one responded (Tr. M. 16-17).

When the police officers and fire personnel arrived at the top of the second floor landing they saw a bedroom. Although no one responded to their announcements that they were the Chelsea Police, the officers entered the second floor apartment (Tr. M. 17; 42). Captain Quartieri testified that the apartment was dark and the police and fire personnel were using flashlights to see on the second floor (Tr. M. 42; 49).

Once inside the second floor bedroom, Officer Nelson saw one handgun, a Walther PPK, with a

silencer on top of the dresser (Tr. M. 18). Captain Quartieri testified that he was the first person to enter the bedroom and saw one gun on top of the dresser (Tr. M. 51). Captain Quartieri also observed the dresser to be closed (Tr. M. 51).

Captain Quartieri was with Officer Nelson when he entered the bedroom (Tr. M. 43). Despite the fact that the police still had not heard or seen the elderly woman, Officer Nelson "kept looking for [her] at which time [the police and fire personnel] were unable to locate her". Officer Nelson and Captain Quartieri then descended to the first floor apartment. The lights were off and the elderly woman was not on the first floor either.

The police officers on the scene "secured the weapons they had found in "plain view" and called a detective to the scene. When Officer Nelson went inside the room he could tell that the woman was not in there (Tr. M. 31). After the police had broken the front door to the house and conducted their search of the second floor apartment, the petitioner arrived home with his mother (Tr. M. 64-65). The detective explained to the petitioner that the police would secure the guns for safety reasons at police headquarters in order to keep the guns "away from [the petitioner's] mom" (Tr. M. 71-72). The petitioner then led the detective through his apartment and collected his weapons (Tr. M. 71).

At the time the petitioner collected the weapons at the detective's request, he collected "a lot" of guns

(Tr. M. 94). The detective could not recall the number of guns or which of the seized guns the petitioner provided to him (Tr. M. 94-95). The petitioner also went into an attic that had not yet been searched by police and retrieved one gun (Tr. M. 72).

The petitioner lived at the address with his mother (Tr. M. 114). The petitioner's mother lived in the first floor apartment (Tr. M. 115). There were two apartments on the second floor (Tr. M. 115). The defendant lived in one of the second floor apartments (Tr. M. 115). The other second floor apartment was vacant at the time (Tr. M. 115).

While the police were breaking down his front door and searching his house, the petitioner was at the hospital with his mother (Tr. M. 114). His mother had requested that he take her to the hospital (Tr. M. 122). The petitioner's mother had Alzheimer's (Tr. M. 120). The petitioner prepared to take his mother to the hospital (Tr. M. 122). He had been watching television in his mother's first floor apartment (Tr. M. 122). The petitioner's mother went outside first (Tr. M. 122-123). The petitioner's mother was not shaking and trembling at the time he got into his car with her (Tr. M. 125).

Upon his return from the hospital, the petitioner first learned that someone else was in his house because the lights were on (Tr. M. 114). He had turned the lights off when he left (Tr. M. 114-115). The door to the petitioner's apartment had been locked when he left to take his mother to the hospital

(Tr. M. 115-116). When he got home he discovered the front door had been broken (Tr. M. 117) and that his apartment door had also been pried open (Tr. M. 117).

Minerva Cruz did not testify at the motion hearing (Tr. M. 87). Jose Cuadrado did not testify at the motion hearing (Tr. M. 88). While the Commonwealth attempted to summon Ms. Cruz (Tr. M. 88), it made no effort to locate Mr. Cuadrado (Tr. M. 88).

SUMMARY OF THE ARGUMENT

The community caretaking exception to the Fourth Amendment's Warrant requirement cannot encompass the forced, warrantless entry into a home during the nighttime in order for the police to conduct a discretionary "well-being check". In the instant case, the police did not have reasonable grounds to believe that an emergency existed inside the petitioner's residence. If the standard for "exigency" under the community caretaking or exigent circumstances is lowered to the level of a "well-being check" in a home, particularly where there is no evidence anyone was even inside the home, there will be a rising tide of "well-being checks" performed by law enforcement. The Fourth Amendment cannot countenance the forced entry into the petitioner's home under these circumstances.

Once inside the petitioner's dwelling, the initial forced entry into the petitioner's home revealed no elderly woman in peril; only a handgun in plain view

on the petitioner's dresser. On the basis of that discovery, the officers continued to search for more weapons throughout the home, exceeding the scope of a cursory visual inspection where a person may be hiding. *Maryland v. Buie*, 494 U.S. 325 (1990). The petitioner's Fourth Amendment rights were violated when law enforcement chose not to seek a warrant before continuing their subsequent warrantless searching. On these bases, this Court should grant the petitioner's petition for a writ of certiorari here.

REASONS FOR GRANTING THE PETITION

1. The extension of the community caretaking or exigent circumstances exception to "well-being checks" like this one would imperil the Fourth Amendment's protection against warrantless intrusions into the privacy of the home.

A search of someone's home or office is generally not reasonable absent a warrant issued on probable cause. *Maryland v. Buie*, 494 U.S. 325, 331 (1990). In determining reasonableness, this Court has balanced the intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). "Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of

legitimate governmental interests." *Villamonte-Marquez*, 462 U.S. at 588.

The Court has recognized an emergency exception to the warrant requirement. *Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (applying the emergency exception by fire department personnel to a warrantless entry of a burning building). Generally, under the emergency doctrine, there must be a reasonable basis, sometimes said to be approximating probable cause, both to believe in the existence of the emergency and to associate that emergency with the area or place to be searched. 3 *W. LaFave, Search & Seizure* § 6.6(a) (3d Ed. 1996). This exigency has been most frequently applied in cases where the government actors were performing "community-caretaker" functions rather than traditional law-enforcement functions. *Tyler*, 436 U.S. at 509 (applying the emergency exception to a warrantless entry of a burning building); "The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home – a zone that finds its roots in clear and specific constitutional terms: 'The right of the people to be secure in their . . . houses . . . shall not be violated.' That language unequivocally establishes the proposition that "[at] the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Payton v. New York*, 445 U.S. at 573, 589-590, quoting *Silverman v.*

United States, 365 U.S. 505, 511 (1961). In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant. *Welsh v. Wisconsin*, 466 U.S. 740 (1984).

The question presented in this petition is whether the police may extend this emergency exception to forced warrantless entries into citizens' homes in order to perform "well-being checks." Here, there was no evidence that police and fire personnel's breaking in the defendant's home was based upon " . . . exigencies of the situation made that course imperative." *McDonald v. United States*, 335 U.S. 451, 455-456 (1948).

Officer Nelson's recanting of the uncorroborated opinion of Mr. Cuadrado that a woman might need assistance does not justify the forced entry into a citizen's home by numerous agents of the government. Mr. Cuadrado's opinion regarding the elderly woman is even more suspect where Cuadrado did not speak English and the elderly woman did not speak Spanish, and where Cuadrado did not even relate to the police that he saw the woman enter the petitioner's home. "The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." *Mincey v. Arizona*, 437 U.S. 385, 392 (1978). This exception though must necessarily apply to a narrow class of circumstances.

This exigency has been most frequently applied in cases where the government actors were performing "community-caretaker" functions rather than traditional law-enforcement functions. *Tyler*, 436 U.S. at 509. A "well-being check" made by breaking into a house which may or may not be occupied is not the type of exigency that "makes the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 393-394 (1978); *see also Board of Selectmen v. Municipal Court*, 373 Mass. 783 (1977) (fact that police officer was found shot outside home did not justify intensive search of house).

"Well-being checks" made under the circumstances in this case are readily distinguishable from other emergency situations that the Court has deemed constitutionally permissible. In *Brigham City v. Stuart*, 547 U.S. 398 (2006), for example, the officers heard fighting and saw a person struck in the face and bleeding. On the basis of that observation, it was reasonable for law enforcement to believe an emergency existed. Here, no one saw any person enter the petitioner's home, there were no noises made, and there was no evidence that any one was even inside the home before the government agents broke down the door and commenced the "well-being check." The Court must not condone this major encroachment upon the Fourth Amendment.

2. Even if the Court rules that the initial entry into the petitioner's home did not violate the Fourth Amendment, the search that ensued after the police found a gun and silencer, but no elderly female, exceeded the scope of the emergency exception and the police should have sought a warrant before continuing their search.

Once the police saw a gun on a dresser on the second floor apartment, and there was no elderly woman to be found, their continued search for weapons was not based on any exigency. There was no one home and no emergency that would have prevented the police from applying for a search warrant to continue to search the empty home. The Court will examine several factors in assessing whether the exigency exists such as the degree of the urgency, the amount of time necessary to obtain a warrant, the nature of the evidence, and the feasibility of securing the premises. If the officers can safely secure the premises, even for several hours, while a warrant is sought, they must do so. *Rawlings v. Kentucky*, 448 U.S. 98 (1980).

Although the police may act without a warrant when confronted by exigent circumstances, the scope of their actions "must be strictly circumscribed by the exigency." *Terry v. Ohio*, 392 U.S. 1 (1968). Police may not expand the warrantless search by taking actions unrelated to the initial purpose of the authorized intrusion. *Arizona v. Hicks*, 480 U.S. 321 (1987). In *Hicks*, a subsequent warrantless search of the serial

numbers on certain stereo equipment was held invalid as exceeding the scope of the exigency when the initial purpose of the officers' forced entry was to investigate shots fired within the apartment.

CONCLUSION

The police officers' desire to perform a "well-being check" must be weighed against the citizen's well-settled right to privacy in his home. The two interests need not be given equal weight. A "well-being check" does not fit within the "emergency exception" to the Fourth Amendment's warrant requirement. For the foregoing reasons, the petitioner respectfully moves that the petition for writ of certiorari to the Supreme Judicial Court of Massachusetts be granted.

Respectfully submitted,

Petitioner JACK LINDSEY, by

MARK STEVENS, ESQUIRE
Counsel of Record
5 Manor Parkway
Salem, NH 03079
(603) 893-0074

COMMONWEALTH vs. JACK LINDSEY.

No. 07-P-696.

Suffolk. February 11, 2008. – August 29, 2008.

Present: Cypher, Armstrong, & Rubin, JJ.

Indictments found and returned in the Superior Court Department on March 28, 2002.

A pretrial motion to suppress evidence and a motion to dismiss were heard by Barbara J. Rouse, J., and the cases were tried before Margaret R. Hinkle, J.

Mark Stevens for the defendant.

Anne M. Thomas, Assistant District Attorney, for the Commonwealth.

RUBIN, J. The defendant was convicted after a jury trial in the Superior Court on fourteen indictments related to the illegal and unlicensed possession of firearms, after police found firearms, ammunition, and silencers in his house while responding to a call indicating that the defendant's mother was in distress. He argues that the motion judge erroneously denied his motion to suppress the evidence found in his house on grounds that the police entry into his house was unconstitutional, and that the same judge erred in denying the defendant's motion to dismiss because the Commonwealth failed to disclose a police report containing the name and last known address of a potential witness at the suppression hearing. He also argues that the trial judge erred in ruling that

the court lacked the discretion to give the defendant the sentence he requested.

I.

We turn first to the motion to suppress. "In reviewing a motion to suppress, we accept the judge's findings of fact unless they are clearly erroneous, but we independently review the application of constitutional principles to the facts found." *Commonwealth* v. *Allen,* 54 Mass. App. Ct. 719, 720 (2002) (footnote omitted), citing *Commonwealth* v. *James,* 427 Mass. 312, 314 (1998). The defendant urges that evidence deriving from a warrantless search of his home should have been suppressed under the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights. We summarize the facts found by the motion judge.

During the evening of November 27, 2001, the Chelsea police department received a 911 call. The caller, Minerva Cruz, reported that there was an elderly woman trembling outside her house and asking for help, and that Cruz was concerned for the woman's well-being.[1] Officer Edwin Nelson of the Chelsea police department responded to the call. When he arrived, Cruz told him that, in fact, she had not seen the woman, but instead a neighbor named Jose Cuadrado had seen her. Cuadrado did not speak

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[1] The 911 call was apparently played at the motion hearing, but its transcript does not appear in the record before us.

fluent English, so he found Cruz, who called the police. Cruz, who lived at 32 Cary Avenue, told Officer Nelson that she was familiar with the woman, who lived at 36 Cary Avenue, and that the woman was in failing health. Cruz said that Cuadrado had told her that the woman in the street appeared to be in ill health and was asking for help and pointing behind her at 36 Cary Avenue. While Cuadrado did not speak English well, he understood enough to think that the woman needed assistance. Cuadrado went to elicit help from Cruz, who called the police. As soon as Cruz called the police, she and Cuadrado went outside. The woman had disappeared. Cruz told Officer Nelson that they had searched the immediate area for the woman, and had been unsuccessful in finding her.

Officer Nelson called Sergeant Joseph Fern, who came to the scene. They concluded that the woman had likely gone back into her house and that she might be in need of emergency medical assistance. They called the fire department to assist in gaining entry to 36 Cary Avenue because no one responded to their knocking and their announcement that the police were there, and to provide emergency medical assistance. At the officers' direction, firefighters used hydraulic tools to open the locked front door. While searching for the woman, the officers entered an unlocked second-floor bedroom where they saw in plain view two handguns on top of a dresser, at least one of which had a silencer on it. Other firearms, gun

parts, and ammunition were strewn about the second floor and in plain view.[2] Both the second floor and the first floor, where the defendant's mother lived, were in extremely unsanitary condition, and among other things, there were about fifteen one-gallon drums of fuel in a kitchen on the second floor, some as close as two feet from the stove.

The police did not move the guns. Concerned about public safety given the house's now unlocked door, the officers called Detective Scott Conley of the Chelsea police department to help secure the scene. One of the firefighters also called the inspectional services department because he had questions about the house's fitness for human habitation. When Detective Conley arrived, he inspected the firearms. He confirmed that there were no trigger locks on some of the weapons, about half of which were loaded.[3]

The defendant then returned home with his elderly mother, with whom he had been at the hospital. She was wearing a nightgown and was shaking

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[2] Officer Nelson testified that he had seen one of the guns in plain view in a half-open drawer of a dresser in the second-floor bedroom; one of the firefighters, Captain John Quatieri, testified that he thought the drawers of the dresser were closed. The motion judge did not make any specific finding regarding whether that particular gun was, in fact, in plain view, but we read her finding that guns, ammunition, and gun parts were in plain view "strewn around the apartment" to encompass it.

[3] The defendant does not challenge the detective's inspection of the weapons.

and disoriented. The defendant cooperated with the police, stating that he did not have a firearms identification card or license. He volunteered to retrieve another firearm from his attic and allowed the police to secure and store the weapons at the police station, at least until he could obtain a firearms identification card. Once the police inspected the weapons at the station, they noted that at least one had a defaced serial number, and another was listed as stolen. They also noticed large capacity feeding devices and a silencer for which a license is required.

The question before us is whether the entry into the house and the bedroom on the second floor was permissible under the so-called "emergency exception" to the warrant requirement.

The emergency exception "applies when the purpose of the police entry is not to gather evidence of criminal activity but rather, because of an emergency, to respond to an immediate need for assistance for the protection of life or property. 'The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.' *Mincey* v. *Arizona,* 437 U.S. [385, 392 (1978)], quoting from *Wayne* v. *United States,* 318 F.2d 205, 212 (D.C. Cir.), cert. denied, 375 U.S. 860 (1963)." *Commonwealth* v. *Bates,* 28 Mass. App. Ct. 217, 219 (1990). For the emergency exception to apply, "the burden of proof is on the Commonwealth to show that the warrantless entry falls within the exception and that there were reasonable grounds for the. . . . police to believe (an objective standard)

that an emergency existed." *Id.* at 219-220. *See Commonwealth* v. *Snell,* 428 Mass. 766, 774-775, cert. denied, 527 U.S. 1010 (1999). This exception applies to a narrow class of circumstances; "[t]he injury sought to be avoided must be immediate and serious, and the mere existence of a potentially harmful circumstance is not sufficient." *Commonwealth* v. *Kirschner,* 67 Mass. App. Ct. 836, 841-842 (2006).

Here there is no question that the purpose of the search was to protect life and not to gather evidence of criminal activity. The defendant argues, however, that there were not objectively reasonable grounds for Officer Nelson and Sergeant Fern to believe that an emergency existed. *See Commonwealth* v. *Snell, supra*; *Commonwealth* v. *Ringgard,* 71 Mass. App. Ct. 197, 200-201 (2008). In making that determination, we must evaluate the actions of the police in the proper context and not with 20/20 hindsight. *See Commonwealth* v. *Ortiz,* 435 Mass. 569, 574 (2002), quoting from *Commonwealth* v. *Young,* 382 Mass. 448, 456 (1981) ("The officers were in the midst of a very hectic scene, and their response is 'to be evaluated in relation to the scene as it could appear to the officers at the time, not as it may seem to a scholar after the event with the benefit of leisured retrospective analysis'"). We must, of course, rely only on evidence known to the police at the time of the warrantless entry.

Officer Nelson responded to a report of an elderly neighbor standing outside her house on an evening in late November, trembling and asking for help. He was

told by Cruz that she knew the woman and knew she was in ailing health. Officer Nelson was aware that the description of the woman's condition was sufficient to have resulted in Cruz calling 911. The information conveyed to Officer Nelson warranted a conclusion that the woman might be in need of medical assistance. Because Cruz and Cuadrado had been unable to find the woman in the immediate vicinity after calling the police, it was also reasonable to assume that she had returned to her home. When the police, however, knocked on the door of the house and announced their presence, they received no response. At that point, it was reasonable for the police to conclude that a serious medical emergency was occurring, one that could result in death if the afflicted person was not given timely and proper treatment. In such medical emergencies, time is of the essence, requiring swift action. "The reason is plain: 'People could well die in emergencies if police tried to act with the calm deliberation associated with the judicial process.'" *Commonwealth* v. *Ringgard, supra* at 201, quoting from *Wayne* v. *United States, supra.*

Thus, there were objectively reasonable grounds to conclude that there existed a real emergency that required immediate assistance for the protection of the elderly woman's life. In these circumstances, the actions of the officers in entering the house and its rooms to search for the ailing woman were reasonable.[4] The warrantless search thus fell within the

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[4] The defendant's reliance on *Commonwealth v. Bates,* 28 Mass. App. Ct. at 219, to show that the police entry here was

(Continued on following page)

emergency exception to the warrant requirement, and the motion to suppress was correctly denied.[5]

II.

The defendant next argues that the motion judge erred in denying his motion to dismiss where the Commonwealth failed to turn over Officer Nelson's police report for well over one year. The defendant was arrested in November, 2001, and indicted in

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unjustified is misplaced. In *Bates*, the police received a report of a missing person and, more than three hours later, sent officers to the missing person's apartment. *Ibid.* They entered without a warrant when they thought they heard the volume on a television set in the apartment increase after they first knocked. *Id.* at 218. We held that, given the delay, it was not impracticable for the police to have obtained a warrant, and that the fact that a television set inside the apartment was on or that the volume was raised did not obviate the need for a warrant; that is, that it did not give rise to a reasonable belief that the missing person was in immediate danger. *Id.* at 221-222. Here, as described, the police had ample reason to believe that the elderly woman was both in the house and in need of immediate medical assistance.

[5] The defendant also contends that, even if the initial entry and search were permissible under the emergency exception, the officers' role changed "once [they] saw a handgun and silencer in the defendant's bedroom and did not detect the presence of any people in the room. . . . Any exigency concerns the police may have had were dispelled when they determined no one was in the apartment." While the defendant's major premise is correct that the scope of a warrantless search may be no broader than is justified by the exception permitting it, there is no evidence to support his contention that the police continued to search the second-floor bedroom once they had determined that the elderly woman was not in it.

March, 2002. Police reports were specifically requested in the pretrial conference reports in May, 2002. The Commonwealth, however, provided the report only in September, 2003, immediately before a scheduled hearing on the defendant's motion to suppress. The report revealed to the defense for the first time the existence of one witness, Jose Cuadrado, and his address. The motion judge, appropriately, attempted to address the circumstance of the Commonwealth's delayed disclosure of Officer Nelson's report by granting a continuance of the hearing. The defendant hired a private investigator to interview Cuadrado. The investigator went to the address at which Cuadrado had lived, but found that he had moved a year before. One of the residents believed that Cuadrado moved to Puerto Rico.

"[E]vidence that is in the possession of the government and that could aid materially in the defense of pending charges must be disclosed." *Commonwealth* v. *Miozza,* 67 Mass. App. Ct. 567, 574 (2006). "When a claim has been made that the Commonwealth has lost, destroyed, or otherwise failed to preserve evidence in its possession, custody, or control" – which is in essence what the defendant alleges – "the defendant need not show conclusively the exculpatory nature of the destroyed evidence but, rather, must establish a '"reasonable possibility, based on concrete evidence rather than a fertile imagination," that access to the [destroyed material] would have produced evidence favorable to his cause.' Thus, the defendant must first establish that it was

reasonably possible that the destroyed evidence was exculpatory." *Commonwealth* v. *Sasville,* 35 Mass. App. Ct. 15, 20-21 (1993) (footnote and citation omitted).

Even when a defendant can meet this evidentiary threshold, the motion judge must use a balancing test in determining the appropriate remedy. *Id.* at 21, quoting from *Commonwealth* v. *Charles,* 397 Mass. 1, 14 (1986) ("In determining the appropriateness and extent of the remedy [for loss, destruction, or failure to preserve evidence], the judge must employ a balancing test whereby 'the culpability of the government will be weighed along with the materiality of the evidence and the potential prejudice to the defendant' "). The determination of the appropriate remedy is one that lies within the motion judge's sound discretion. *Commonwealth* v. *Sasville, supra* at 21.

Given the weakness of the defendant's evidence of potential prejudice, the motion judge's denial of the motion to dismiss was not an abuse of discretion. The premise of the defendant's argument is, inexplicably, that "Officer Nelson's interview with Jose Cuadrado is the sole basis for the police decision to force an entry into the defendant's home."[6] The defendant

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[6] While Officer Nelson did testify that he spoke with Cuadrado as well as Cruz and that Cuadrado essentially repeated the story Cruz had told him, the focus of Officer Nelson's testimony was on the 911 call and the conversation with Cruz. As our discussion above makes clear, the decision to enter was proper based on all the evidence known to the police,

(Continued on following page)

argues that the Commonwealth's failure to turn over Officer Nelson's report and Cuadrado's name and address until Cuadrado was unavailable deprived the defendant of his right to cross-examine and impeach Officer Nelson's testimony.

The defendant neither suggests to what it is he imagines Cuadrado might have testified, nor does he provide any basis for suggesting that Cuadrado would have provided evidence that would have undermined Officer Nelson's testimony with respect to the relevant facts. The likelihood that the lost potential testimony would have been helpful is reduced by the substantial evidence, beyond Officer Nelson's own recounting and including the defendant's own testimony, corroborating Officer Nelson's testimony on the factual issues relevant to our determination that there were reasonable grounds for the police to have concluded that they faced a genuine emergency. This evidence includes the fact of the 911 call; the testimony of Detective Conley that when the defendant returned to the house he was accompanied by his elderly mother who was wearing "a nightgown or something of that nature"; and the defendant's own testimony that his mother had asked him to go to the hospital; that, after he had prepared to take her

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including the 911 call, the conversation with Cruz, the unanswered knocking on the door and announcing, the attending circumstances, and the reasonable inferences that could be drawn therefrom. The conversation with Cuadrado thus was not the only basis for the challenged police action.

there, he had unexpectedly found her standing outside the house; that she suffered from dementia; and that she had, on at least one occasion, wandered away from the house.

In the face of this evidence, the claim that Cuadrado would have provided evidence that would have undermined the factual conclusions on which our determination rests, that is, that Cuadrado's failure to testify was prejudicial, is speculative. In these circumstances, we cannot conclude that the motion judge abused her discretion in determining not to employ what the defendant himself, citing *Commonwealth* v. *Lam Hue To,* 391 Mass. 301, 314 (1984), recognizes is the "drastic remedy" of dismissal for the Commonwealth's failure.

III.

Finally, the defendant challenges the propriety of his sentence. After a jury trial, the defendant was found guilty on fourteen of the indictments against him, and the case proceeded to sentencing. At the sentencing hearing, the defendant requested that the trial judge suspend all but one year of the defendant's sentence on indictment six under G. L. c. 269, § 10(*m*). The Commonwealth argued that the statute required a mandatory minimum sentence of imprisonment of two and one-half years. The trial judge asked the defendant's counsel during the sentencing hearing, "But I don't think I have that power [to impose the defendant's requested sentence] under

truth in sentencing, do [I]?"[7] The defendant was sentenced on that indictment to serve not more than two and one-half years and a day, but not less than two and one-half years in State prison, and the trial judge allowed the defendant's motion to stay the sentence, saying, "I think I would appreciate the appellate court's comment on what the statute says with regard to the mandatory sentence."[8]

General Laws c. 269, § 10(*m*), is a confusing statute which has caused courts some consternation and we appreciate the trial judge's difficulty. Section 10(*m*) provides, in relevant part:

> "[A]ny person not exempted by statute who [unlawfully possesses a large capacity weapon or feeding device] therefor . . . shall be punished by imprisonment in a state prison for not less than two and one-half years nor more than ten years. The possession of a valid firearm identification card . . . shall not be a defense for a violation of this subsection; provided, however, that any such

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[7] The "Truth in Sentencing" statute, which was enacted five years before § 10(*m*), provides in part that "[s]entences of imprisonment in the state prison shall not be suspended in whole or in part." G. L. c. 127, § 133, inserted by St. 1993, c. 432, § 11. This language "eliminated suspended and so-called split State prison sentences." *Commonwealth v. Russo*, 421 Mass. 317, 319 n.2 (1995).

[8] The defendant was sentenced to concurrent terms of three years' probation on each of four other indictments, to commence after completion of his sentence under indictment six. The remainder of his convictions were placed on file.

> person charged with violating this paragraph and holding a valid firearm identification card shall not be subject to any mandatory minimum sentence imposed by this paragraph. The sentence imposed upon such person shall not be reduced to less than one year, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, furlough, work release or receive any deduction from his sentence for good conduct until he shall have served such minimum term of such sentence. . . ."

G. L. c. 269, § 10(*m*), inserted by St. 1998, c. 180, § 70.

The first sentence by its terms requires a sentence of not less than two and one-half years. The Supreme Judicial Court has explained that "not less than" language such as that appearing in § 10(*m*), at least where the statute provides a minimum and a maximum permissible sentence, ordinarily sets out the "mandatory minimum term." *See Commonwealth* v. *Brown*, 431 Mass. 772, 775 (2000).[9]

The third sentence, however, could be construed independently to set out a mandatory minimum of one year of imprisonment.[10] *See, e.g., Commonwealth*

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[9] "Not less than" language does not always create a mandatory minimum. Cf. *Commonwealth v. Hines*, 449 Mass. 183, 191 n.4 (2007).

[10] The second sentence of § 10(*m*), which provides that "any such person charged with violating this paragraph and holding a valid firearm identification card shall not be subject to *any* mandatory minimum sentence imposed by this paragraph"

(Continued on following page)

v. *Lightfoot,* 391 Mass. 718, 721 (1984) (holding that identical statutory language "indicates the minimum sentence which a judge may impose" and "ensure[s] a . . . mandatory minimum sentence")[11]; *Commonwealth* v. *Berte,* 57 Mass. App. Ct. 29, 32 (2003) (similar statutory language has same effect).[12]

In light of this, and of principles of lenity requiring ambiguous criminal statutes to be construed against the Commonwealth, on a blank slate one might read the statute to impose a mandatory minimum of one year. Cf. *id.* at 33, quoting from *Commonwealth* v. *Marrone,* 387 Mass. 702, 705 (1982) (stating that we "will not interpret a . . . criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be

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(emphasis added), is irrelevant in this case, in which the defendant did not hold such a card.

[11] The statutory language at issue in *Commonwealth v. Lightfoot, supra* at 719 n.1, provided in relevant part: "The sentence of imprisonment imposed under this section shall not be reduced to less than two years, nor suspended, nor shall any person convicted under this section be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct or otherwise until he shall have served two years of such sentence" (citation omitted).

[12] The statutory language at issue in *Commonwealth v. Berte, supra* at 30 n.2, provided in relevant part: "Said sentence shall not be reduced to less than ten years nor shall the person convicted be eligible for probation, parole, furlough, work release or receive any deduction from his sentence for good conduct" (citation omitted).

based on no more than a guess as to what [the Legislature] intended").

We do not, however, write upon a blank slate. In *Commonwealth* v. *Semegen,* ante ___, ___ (2008), we have held today that § 10(*m*) imposes a general rule requiring a sentencing judge to impose on those convicted thereunder a mandatory sentence of imprisonment of two and one-half years. We construed the third sentence to refer to reductions in sentence, not to the sentence that must be imposed by the sentencing judge, although, as Justice Green explained, "under applicable good time and parole procedures no such reduction would be possible even in the absence of such a prohibition," so that our construction "risk[ed] rendering the provisions of the third sentence meaningless or superfluous." *Id.* at ___ (Green, J., concurring).[13] That construction represents, as all our decisions do, the considered decision of a majority of the court. *See Sciaba Construction Corp.* v. *Boston,* 35 Mass. App. Ct. 181, 181 n.2 (1993).

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[13] Justice Green concluded that the Legislature did not intend a greater mandatory minimum penalty for possession of an ordinary firearm under § 10(*a*) than for possession of a high capacity firearm under § 10(*m*). *Commonwealth v. Semegen, supra* at ___ (Green, J., concurring). The mandatory minimum under § 10(*a*) is now eighteen months, although it is to be served in a house of correction. We note that this incongruity was created only in 2006 by an amendment to § 10(*a*) that raised the mandatory minimum from one year to be served in a house of correction. *See* St. 2006, c. 48, § 5. None of the other pre-existing subsections of § 10, including § 10(*m*), were altered by that amendment.

It is binding upon us. Consequently, we leave the sentence imposed by the trial judge undisturbed.[14]

Judgments affirmed.

[14] The trial judge asked us for guidance on whether a portion of the defendant's sentence could be suspended notwithstanding the "Truth in Sentencing" statute, G. L. c. 127, § 133, which, as described at note 7, *supra*, eliminated suspended and split State prison sentences, that is, those in which a portion of the sentence of imprisonment is suspended. While the after-enacted, specific language of § 10(*m*) prohibiting the sentence from being "reduced to less than one year, [] or suspended," might be read to prohibit suspension in full, but to take precedence over § 133 and to permit split sentences like the one sought by the defendant – a construction that would eliminate the superfluity problem identified by Justice Green – we read *Commonwealth v. Semegen, supra*, to foreclose that result.

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston,

In the case no. 07-P-696

COMMONWEALTH

vs.

JACK LINDSEY.

(Filed Dec. 2, 2008)

Pending in the Superior [SUCR 2002-10332]

Court for the County of Suffolk

Ordered, that the following entry be made in the docket:

Judgment affirmed.

By the Court,

/s/ Joseph F. Stanton ; Clerk

Date August 29, 2008.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
CRIMINAL ACTION
NO. 2002-10332

COMMONWEALTH

vs.

JACK LINDSEY

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION TO DISMISS AND MOTION TO SUPPRESS

INTRODUCTION

Before the court is the motion to dismiss of the defendant as well as a motion to suppress evidence seized pursuant to a warrantless search of his home. After hearing and based on all of the credible evidence, I make the following findings of fact and rulings of law.

FINDINGS OF FACT

At approximately 8:00 p.m. on November 27, 2001, Officer Edwin Nelson (Officer Nelson), a member of the Chelsea Police Department, was on uniformed patrol when he received a radio call to go to 36 Cary Avenue in Chelsea. The nature of that call advised him that it was a "well-being check" and that there was some concern on the part of the neighbor about the safety and condition of an elderly woman who lived next door. The radio call had been prompted by a 911 call placed by a Minerva Cruz

(Cruz) who resided at 32 Cary Avenue in Chelsea. During the 911 call Cruz said that there was an elderly woman trembling outside her house asking for help and that she was concerned for her well-being. Officer Nelson had never been to 36 Cary Avenue and he did not know of any criminal activity which had occurred there.

Cruz met Officer Nelson outside of either 36 or 32 Cary Avenue; it is not clear exactly which one. Cruz told Officer Nelson that a person by the name of Jose Cuadrado (Cuadrado) had come to her house and told her that he had been approached by an elderly woman in the street who appeared to be in ill health asking for help and pointing to the house at 36 Cary Avenue. Because he did not have a full command of the English language, but understood enough to think that the woman needed assistance, Cuadrado went to 32 Cary Avenue to elicit help from Cruz who, in turn, called the police. As soon as Cruz called the police, she and Cuadrado went outside and searched the immediate area for the woman. They were unsuccessful in finding her. Cruz knew that the elderly woman who lived at 36 Cary Avenue had some health problems.

Officer Nelson then called Sergeant Joseph Fern (Sergeant Fern) of the Chelsea Police who came to the scene. After Sergeant Fern conferred with Officer Nelson they decided that they should determine that this woman was not in a life-threatening situation. I find that it was reasonable for the police to conclude that the woman may have returned to her home

because both Cruz and Cuadrado had looked for her unsuccessfully outside. It was also reasonable to believe that she was in need of medical assistance based on what they were told by Cruz.

The police officers called the fire department to assist in gaining entry to 36 Cary Avenue because no one responded to their knocking and announcing that they were there. Captain John Quatieri of the Chelsea Fire Department responded with two other firefighters. Both Captain Quatieri and one other firefighter were emergency medical technicians. Captain Quatieri and his men used hydraulic tools to open the locked front door. There is conflicting testimony about whether the police proceeded initially to the first or second floor. I find that to be inconsequential. The police and fire personnel searched both floors, not knowing exactly where the woman might be found.

The officers went to the second floor landing and entered an unlocked door to a bedroom. I do not credit the defendant's testimony that the door to his bedroom was locked. There was no tenant on that floor as apparently there had been from time to time and so the only persons occupying that house were the defendant and his mother who lived on the first floor. As soon as the police entered the bedroom on the second floor, they saw two handguns on top of the dresser or the bureau, at least one of which had a silencer on it. They saw in plain view other firearms, ammunition, and gun parts on the bed, floor and strewn around the apartment. The officers observed

that the guns were not secured by a trigger lock which was a violation of state law.

Both the first floor and second floor were in a terrible sanitary condition. Birds were nesting in holes in the wall. There was evidence of some kind of animal droppings or cat feces. An odor of urine and animal waste permeated the house. There were about fifteen one gallon drums or cans of what appeared to be fuel in the kitchen – some as close as two feet from the stove. Captain Quatieri said that vapor from the store could ignite a car if it was left open. He was concerned that the apartment presented a fire and health hazard. There were machine shop tools in the living room, boxes of clothes, and clutter everywhere.

Because there was a public safety issue concerning access to the dwelling due to the broken lock on the front door, Detective Scott Conley (Detective Conley) of the Chelsea Police was called to assist with the large cache of weapons. Additionally, Captain Quatieri decided to call the inspectional services department because there was a question about whether the house was fit for human habitability.

No one was found in the house. All the weapons which were initially observed to be in plain view by the officers were left there in their original place until Detective Conley arrived. They were not moved in any way. When Detective Conley arrived, he inspected the weapons carefully. He confirmed that there were no trigger locks on some of the weapons about fifty percent of which were loaded.

Sometime after Detective Conley arrived, the defendant came home with his elderly mother who was shaking and disoriented. She was dressed in a nightgown and I assume that is how she left her house when she approached Cuadrado on the street. The defendant told the officers that he had taken his mother to the hospital. The defendant concedes that his mother suffers from dementia.

The defendant, from the time he initially came home until after his arrest, was very cooperative. When the police said that the guns would have to be secured he said that he did not have a way to do that. There was conversation about whether he held a firearm identification card or license. He said that he did not and he agreed that the weapons should be secured at the police station at least until he could obtain a firearm identification card. The defendant volunteered to retrieve a rifle stored in the attic.

The weapons were then secured and taken to the station. Before weapons can be logged in, police policy dictates that those weapons be examined and run through a database to determine if they are stolen. At least one of the weapons had a defaced serial number and another weapon was identified as stolen. There were large capacity feeding devises and a silencer for which a license is required. Some of the magazines did not appear to match some of the weapons.

The police then returned to 36 Cary Avenue to arrest the defendant and took him to the station after giving him time to arrange for his mother's care. At

the police station he was advised of his Miranda rights. The defendant testified that he was not "read" his rights. The defendant does not claim that he was not advised of his rights; only that they were not read to him. The defendant is a mature man in his fifties who appeared to be intelligent and alert. He signed a form that indicates he had been advised of and understood his rights "under the constitution and Massachusetts Law". There is no evidence of any coercion or duress or that the defendant was under the influence of alcohol, drugs or any medication at the time he signed the form. I find that he was advised, whether read or not, of his rights.

The defendant continued to be cooperative when he was in the lock-up. Detective Conley wanted to return to the house to see if there were some other weapons because not all of the magazines matched the weapons which were taken from the house. Detective Conley presented the defendant with a consent to search form. The consent to search form is clear and easy to understand. It specifically indicates that a person has a right to refuse consent, that he can require the police to obtain a search warrant, that he has a right to consult with an attorney before or during the search, that he can withdraw his consent at any time, and that anything found in the course of the search can be used as evidence.

The defendant contends that the police told him they would search whether or not he granted the consent. I find that not to be credible. The defendant does not dispute that he signed the form which

clearly advised him of his rights. The defendant was in the same alert frame of mind as when he waived his Miranda rights. Additionally, he volunteered to Detective Conley that there may be more weapons in the kitchen cabinets. I find that the defendant knowingly and voluntarily gave his consent. The police found no more firearms but did find some large hunting knives and ammunition.

The police have attempted to locate Cruz in the last several weeks. They attempted unsuccessfully to serve a subpoena on Cruz at 32 Cary Avenue. Her landlord said she no longer resided there, that she had left within the last three months, and that she may be living in Revere. The police then attempted to [sic] a phone number which was out of service. They were able to contact a boyfriend who said they no longer had a relationship and that he did not know where she lived. The whereabouts of Cuadrado is unknown; there is some suggestion that he may be in Puerto Rico. No specific efforts have been made to locate him.

RULINGS OF LAW

The thrust of the motion to dismiss is that the defendant suffers prejudice because Cuadrado is not available to testify. There has been no showing that Cuadrado would assist materially or reasonably in the defense of this case. There is no reason to think Cuadrado would provide exculpatory evidence. The 911 tape of Cruz clearly indicates her concern about

the defendant's mother's well-being and safety. The defendant corroborated his mother had dementia. We have Officer Nelson's account of his conversation with Cruz. It is unclear whether Officer Nelson talked directly to Cuadrado but, at any rate, there is no reason to believe that Cuadrado's testimony would significantly or reasonably assist the defense. The motion to dismiss is denied.

I turn next to the motion to suppress. The threshold issue on a warrantless search is whether the Commonwealth has satisfied its burden to show that the warrantless entry to 36 Cary Avenue falls within an exception. *Commonwealth* v. *Franklin*, 376 Mass. 885, 898 (1978). The exception that the Commonwealth urges upon the court is the emergency or community protection exception. The emergency exception applies when the purpose of the police entering a dwelling is not to gather evidence of criminal activity but rather to respond to an immediate need for assistance or to protect life or property. *Commonwealth* v. *Snell*, 428 Mass. 766, 774 (1999) (citations omitted). Whether or not an emergency situation exists is to be viewed by an objective standard, that is, not what the police subjectively might have thought but whether there were reasonable grounds for the police to believe objectively that an emergency existed. *Id.* at 774-75; *Commonwealth* v. *DiGeronimo*, 38 Mass. App. Ct. 714, 722-23 (1995); *Commonwealth* v. *Bates*, 28 Mass. App. Ct. 217, 219 (1990).

I find that the Commonwealth has made the requisite showing. The police received a 911 call from Cruz who expressed concern about an elderly neighbor on the sidewalk asking for help who appeared to be in ill health. Both Cruz and Cuadrado searched unsuccessfully on the street for the woman moments after Cuadrado saw her on the sidewalk. Therefore, it was reasonable to assume that she was Cruz's neighbor who might have returned to her home. There was nothing in the record to suggest that this was a pretext on the part of the police to try to find incriminating evidence. The police had not been to this address before. they knew of no criminal activity which had occurred there.

From an objective standpoint, the mother's dementia, the fact that she was wandering around the street in her nightgown, the fact that she appeared to be in ill health,[1] were grounds for the police to believe an emergency existed which threatened the health, well-being and life of Mrs. Lindsey. The police enlisted the fire department to gain entry and to provide emergency medical assistance. All of this demonstrates the police had reasonable grounds to believe an emergency existed at the time of entry. *Commonwealth* v. *Snell*, *supra* at 774-75.

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[1] It was reasonable of the police to rely on Cruz's description and knowledge as a neighbor who appeared to be genuinely concerned about Mrs. Lindsey's welfare.

Once the police gained entry to the house, they then had the right to seize the firearms and ammunition and parts of firearms which they observed in plain view. When incriminating evidence inadvertently comes into plain view in a place where the police have a legitimate right to be, they have a right to seize those items which, in this case, they knew from visual inspection were not in compliance with state law. *Commonwealth* v. *Santana*, 420 Mass. 205, 211 (1995) (citations omitted). Additionally, the defendant voluntarily assisted in gathering up the weapons including retrieving one from the attic.

The police returned to the home for a second search pursuant to a consent form signed by the defendant. The consent to search form enumerates in detail the rights that the defendant has in connection with the search of the premises. Even though the police are not required to inform an individual giving consent that he has a right to refuse consent or required to inform the person giving consent why it is that they want to search the premises, *Commonwealth* v. *Sanna*, 424 Mass. 92, 97-98 n. 10 (1997), the consent form expressly advised the defendant of these rights.

The defendant had the authority to give consent because he lived in that house. There was no evidence as to who owned it but he and his mother lived there and he had the authority to give consent to search his apartment on the second floor.

The defendant suggested to the police that they might find more weapons in the kitchen cabinets. He did not withhold any information and he was cooperative. The fact that the defendant was in custody at the time does not preclude a finding that he gave his consent voluntarily. There was no evidence that he was under any coercion or duress. See *Ohio* v. *Robinette*, 519 U.S. 33 (1990). When he signed the form the defendant knew what he was doing, understood the consequences of giving consent and acted voluntarily.

ORDER

For all of the foregoing reasons, it is hereby ***ORDERED*** that the defendant's motion to dismiss and motion to suppress be ***DENIED***.

/s/ Barbara J. Rouse
Barbara J. Rouse
Justice of the Superior Court

DATED: March 11, 2004

Supreme Judicial Court for the
Commonwealth of Massachusetts
John Adams Courthouse
One Pemberton Square, Suite 1400,
Boston, Massachusetts 02108-1724
Telephone 617-557-1020, Fax 617-557-1145

Mark L. Stevens, Esquire
Law Office of Mark L. Stevens
5 Manor Parkway
Salem, NH 03079

RE: Docket No. FAR-17243

COMMONWEALTH
vs.
JACK LINDSEY

Suffolk Superior Court No. SUCR2002-10332
A.C. No. 2007-P-0696

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on 11/25/08, the above-captioned Application for Further Appellate Review was denied.

Susan Mellen, Clerk

Dated: November 25, 2008

To: John P. Zanini, A.D.A.
Mark L. Stevens, Esquire